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376-007—70——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1045

THE JUPITER CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 43a–68a) is not yet reported. The orders of the Commission (Pet. App. 1a–13a, 14a–18a, 19a–33a, 34a–42a) are reported at 39 FPC 417, rehearing denied, 39 FPC 854, and 40 FPC 1455, rehearing denied, 41 FPC 72.

JURISDICTION

The judgment of the court of appeals affirming the Commission's orders was entered October 10, 1969. The petition for a writ of certiorari was filed on January 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly considered a contract interpretation question which petitioner itself had presented both to the court and to the Commission.

2. Whether the Commission, having determined that Jupiter was required to pay producers a specific rate for gas purchased, appropriately required Tennessee, to whom the gas was resold, temporarily to pay that rate directly to the producers for Jupiter's account and the remainder to Jupiter directly when Jupiter refused to comply with the Commission's rate determination.

STATUTE INVOLVED

The Natural Gas Act in pertinent part appears in the Appendix, *infra* pp. 17–20.

STATEMENT

This case is part of the Commission's long history of efforts to regulate the rates charged by the Jupiter Corporation for its transportation of natural gas. Jupiter, through its pipeline, performs a number of separate functions coming within the Commission's jurisdiction. It purchases offshore gas from Phillips Petroleum Company and Kerr-McGee Corporation (Phillips-Kerr-McGee), which it transports onshore and resells to Tennessee Gas Pipeline Company (Tennessee). It also transports to the Tennessee pipeline, for a fee, gas which Union Oil Company of California, as successor to the Pure Oil Company, sells

to Tennessee. Finally—and this is the root of the present controversy—it transports through these same facilities a limited amount of condensate and liquefiable hydrocarbons (less than 5 percent of the total gas stream), which, though part of the gas stream as taken out of the ground and as delivered to Jupiter by Phillips-Kerr-McGee and Union, are not part of the gas sales to Tennessee but are separated out and returned to the producer. Jupiter does some of this separation for the producers.

To summarize the controversy, in 1965 the Commission fixed 18.5 cents per thousand cubic feet (Mcf) as the rate to be charged Jupiter at the wellhead by the producers of gas in the Rollover Field, and temporarily allowed Jupiter to charge Tennessee Gas Pipeline an additional 2.4 cents for transporting the gas pending resolution of an investigation of this rate. After a full administrative hearing, the examiner concluded that petitioner was overcharging the interstate consumers for transporting the gas and ordered a reduced rate. Thereupon petitioner proposed a settlement, which the Commission approved. No judicial review was sought.

For a time petitioner complied with the order approving the settlement, but it then began to withhold an amount equal to the rate declared unlawful by the Commission. Jupiter contended, on various theories, that while the Commission could regulate the rate to transport gas, Jupiter was free to charge any rate for transporting the liquid hydrocarbons and could set-off the additional 1.4 cents per Mcf it claimed for

transporting the condensate and liquefiable hydrocarbons against the rate it was required to pay for its gas purchases.[1]

Believing that the petitioner was deliberately attempting to evade lawful Commission orders, the Commission directed Tennessee to pay the producers directly for the gas and to pay the petitioner the just and reasonable rate for transporting the gas, on a temporary basis. The Commission chose to enforce its own orders, which have immediate effect unless judicially stayed *pendente lite,* instead of applying to the district court for an order of enforcement. Petitioner was afforded full judicial review in the United States Court of Appeals for the District of Columbia Circuit, which upheld the Commission. Petitioner now seeks, not merely a writ of certiorari, but also summary reversal. While the Commission orders related to both the Phillips-Kerr-McGee and the Union aspects of Jupiter's operations, Jupiter's petition here does not challenge the Commission's order or the court decision below insofar as they relate to the Union transaction (Pet. App. 2a).

The Phillips-Kerr-McGee operation.—Since 1953, the gas produced by Phillips-Kerr-McGee has been sold to Jupiter at the lease and resold by Jupiter to Tennessee on shore. Jupiter receives a "spread" representing the difference between what it pays the producers and what it collects from Tennessee (Pet.

[1] Jupiter claimed the right to charge, for transporting liquefiable hydrocarbons and condensate, 1.4 cents per Mcf of *gas*, not per Mcf of the liquefiable hydrocarbons and condensate.

App. 47a; J.A. 15–18). In 1965, the Commission reduced Phillips-Kerr-McGee's rate to 18.5 cents from the higher price it was then receiving, and correspondingly reduced Jupiter's temporary certificate rate from the contract rate of 21.33 cents plus tax reimbursement to a total rate of 20.9 cents. Op. No. 470 (*Phillips Petroleum Co.*, 34 FPC 486, 489). The temporary 2.4-cent spread represented the maximum that could have been allowed Jupiter in the then pending rate investigation from which the present case arises. Jupiter noted, but later abandoned, an appeal from Opinion No. 470.

The Jupiter rate investigation and settlement.—The Commission had begun its rate proceeding against Jupiter under Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), in 1962. After various delays, including efforts by Jupiter to obtain injunctions in the courts against the proceeding and to persuade the Commission to terminate the case, the examiner issued an initial decision (35 FPC 1095), finding .632 cent per Mcf to be a just and reasonable rate for all of Jupiter's services (Pet. App. 48a).

Before the Commission could act on exceptions to this decision, Jupiter proposed a settlement under which it would receive 1.25 cents per Mcf for the transportation of the gas sold to Tennessee (Pet. App. 48a; J.A. 235–236). Noting that its contracts with the producers did not provide separate charges for the several services rendered by it, Jupiter stated "that an equitable resolution of this case requires either a reformation of its various contract[s] with

the Rollover Field producers (Pure, Phillips and Kerr McGee) to require those producers to pay Jupiter, or Commission permission for Jupiter to retain, charges for the gathering of natural gas, and for the services Jupiter renders in gathering, separating and storing those producers' condensate and other liquids" (J.A. 235). Thus, Jupiter further proposed that Phillips and Kerr-McGee should agree to revise their contracts to permit Jupiter to credit against the 18.5 cents per Mcf that Jupiter paid them for the gas it resold an amount of 0.25 cents per Mcf for the "service of gathering and separating Phillips-Kerr McGee's condensate" (J.A. 242).

After various objections from each of the producers and the distributor intervenors, Jupiter amended its offer of settlement (Pet. App. 48a). It now proposed a "contractual sale price" to Tennessee of 19.5 cents, variable only if and "to the extent that a valid action by the Federal Power Commission authorizes a price for gas sold by Phillips-Kerr-McGee to Jupiter at a level different from 18.5 cents per Mcf" (J.A. 257). Thus, Jupiter would receive a one cent spread, reserving its right to collect compensation for its services with respect to the condensate. The Commission approved the settlement (Pet. App. 48a; J.A. 282–291, 35 FPC 1091), over Phillips-Kerr-McGee's objections that their firm 18.5-cent rate should not be reduced and that they had contracted for the additional services to be performed free of charge. The Commission said of the contract reformation issue (Pet. App. 48a–49a; J.A. 288, 35 FPC 1091, 1094):

> Jupiter's reservation of claimed rights with respect to the collection from Union and Phillips-Kerr McGee of compensation for transporting, separating or storing those producers' condensates and liquefiable hydrocarbons and the producers' answers on that point does not present any issue to be determined at this time. Any contractual arrangements Jupiter makes with the producers for those services will be acted upon if and when they are appropriately submitted to this Commission.

In denying Phillips-Kerr-McGee's application for rehearing, the Commission made it clear that it had not meant to indicate either that further negotiations were necessarily possible or that they were required; and that it had simply said that it was "not now determining the claimed rights of any party on this matter" (Pet. App. 6a; 36 FPC at 495–496). Neither Jupiter nor any of the producers petitioned for review of the order approving the settlement.

Post-settlement occurrences.—From June 1966 through May 1967, Jupiter collected 19.5 cents from Tennessee and paid 18.5 cents to Phillips-Kerr-McGee, retaining one cent. Starting in May 1967, however, Jupiter began paying only 17.1 cents to Phillips-Kerr-McGee, claiming that its contract permitted it to reduce its payments to the latter by the same amount that its revenues from Tennessee were reduced. In August 1967, Jupiter sued Phillips-Kerr-McGee in an Illinois state court, seeking to recover on that theory of the contract the differential of 1.4 cents per Mcf it had paid Phillips-Kerr-McGee prior to May 1967, and also seeking a declaration of its contract rights. It

asserted that its contract rights against the producers were unimpaired by the settlement with the Commission, since all sums due it under the contracts (aside from the 1 cent authorized in the settlement) should be deemed compensation for the services relating to condensate and liquefiable hydrocarbons.[2] Phillips-Kerr-McGee then filed a motion with the Commission requesting it to enforce payment of the 18.5-cent rate, as provided in the settlement order (Pet. App. 49a–50a).

The Commission orders under review.—On April 3, 1968, the Commission issued a declaratory order, holding, *inter alia,* (1) that Jupiter was and had since August 11, 1965, been required to pay Phillips-Kerr-McGee the certificate rate of 18.5 cents per Mcf; (2) that compensation for services other than transportation of that part of the gas stream delivered to Tennessee was a separate contractual issue for the courts, where any judicial remedy "may well be a matter of equity rather than law"; and (3) that the amounts at issue in court cases could not be set off against the 18.5-cent certificate rate (Pet. App. 1a–13a).

On May 24, 1968, the Commission denied the rehearing sought by Jupiter (Pet. App. 14a–18a). With

[2] Phillips-Kerr-McGee moved to dismiss or stay the action, contending that the Commission had primary jurisdiction. These motions were denied. While the Illinois court ordered Jupiter not to insist on endorsements that 17.1 cents represented the full amount due, it denied without explanation a request that the 1.4 cent discount in dispute be placed in escrow (Pet. App. 8a, 49a–50a; J.A. 338–341). The Illinois court has not yet rendered a decision.

respect to Jupiter's set-off claim, the Commission held (Pet. App. 16a) that any payments that might be due for alleged nonjurisdictional revenues "may not be commingled or confused with the amounts due for jurisdictional services in Jupiter's accounts."

On July 1, 1968, Phillips-Kerr-McGee filed a motion complaining that Jupiter was continuing to tender it only 17.1 cents, rather than the 18.5 cents prescribed (Pet. App. 51a; J.A. 423–430). This motion was renewed on October 16, 1968 (Pet. App. 51a; J.A. 431–440).[3] In response to these motions, the Commission issued an order on December 13, 1968 (Pet. App. 19a–33a), finding that the only satisfactory way to maintain the integrity of its April 3 and May 24 orders, pending court review, was to direct Tennessee to pay 18.5 cents per Mcf directly to Phillips-Kerr-McGee (for the account of Jupiter) and 1 cent directly to Jupiter. Jupiter was also directed to pay over to the producers the difference between the sums it had paid them for gas since the 1966 settlement order and the price of that gas at 18.5 cents per Mcf. The Commission noted that it would stay this order, if Jupiter promptly sought a stay of the earlier order, pending a court of appeals determination of the stay motion.[4]

Jupiter applied for rehearing of this order contending, *inter alia,* that the Commission could not control the "spread" retained by Jupiter on the gas

[3] Although Jupiter had sought review of the Commission's April 3 and May 24 orders, it had not sought to stay them.

[4] Jupiter's subsequent request for such a stay was denied by the court of appeals on February 6, 1969.

bought from Phillips-Kerr-McGee and sold to Tennessee; and that the Commission had no power to "modify" the April 3 order as to which an appellate review proceeding was pending. On January 22, 1969, the Commission denied Jupiter's application (Pet. App. 34a–42a). As to Jupiter's "spread" contention, unsuccessfully advanced previously, the Commission observed (Pet. App. 36a) "that the contract between Jupiter and Phillips-Kerr-McGee is on file with this Commission as the contractual support for Phillips-Kerr-McGee's rate schedule covering the sale of natural gas to Jupiter and is subject to our jurisdiction as such." The Commission rejected as baseless the claim that the December 13 order modified the earlier orders, noting (Pet. App. 37a) that it "merely enforced the certificate order of August 11, 1965 [prescribing the Phillips-Kerr-McGee 18.5 cent rate], and the settlement order of June 28, 1966, as clarified by the order of April 3, 1968. No conclusions reached by the April 3 order were modified, nor were any responsibilities imposed thereby varied."

The decision below.—The court of appeals affirmed in a detailed opinion (Pet. App. 43a–68a). As had the Commission, it rejected Jupiter's contention that the 18.5-cent rate to Jupiter was not contractually supported (Pet. App. 52a–54a). With respect to Jupiter's assertion that the Commission had conceded a contractual right to payment for non-jurisdictional services, the court concluded (Pet. App. 56a–57a) that—

> * * * the Commission has conceded nothing but the possibility that Jupiter has an equitable claim, disputed by PKM, for the reformation of its contract to require payment by PKM for nonjurisdictional services now that their cost is no longer being absorbed in an excessive charge to Tennessee. The Commission has never conceded that Jupiter is entitled *under the contract as written* to recoup any reductions in the spread chargeable to Tennessee from PKM. Indeed, the Commission scarcely had reason or occasion to do so. Jupiter's contractual argument was rejected by the examiner in the rate proceedings, and its settlement proposals stated in bold-faced type that reformation of its contract was required to enable it to collect payment for condensate services. Jupiter paid the 18.5 cent rate for nearly a year before filing its suit, based on its present theory of the contract, in the Cook County court. When Jupiter finally made its position on the contract somewhat more explicit in its petition for rehearing of the April 3 order, the Commission rejected it in the opinion denying rehearing.

The court also found without merit (Pet. App. 57a) Jupiter's related argument that the Commission had acquiesced in resolution of the filed rate issue by the state court.

The court upheld the Commission's authority to issue its December 13, 1968 enforcement order. It rejected the claim that the action modified the Commission's declaratory orders, noting (Pet. App. 58a–

59a) record support for the Commission's judgment that its implementing order was necessary to assure Jupiter's compliance with the orders that had not been stayed. The court agreed (Pet. App. 59a–60a) with the Commission that the Commission may fashion its own enforcement remedies, where feasible, and that the Natural Gas Act's provisions for judicial enforcement provide supplemental remedies that the Commission may, in its discretion, request.

ARGUMENT

1. Petitioner's principal contention appears to be that the court of appeals erred in considering what effect Jupiter's contract with Phillips-Kerr-McGee might have upon the rights that Jupiter asserts. It is, however, hard to understand this contention, for Jupiter itself has based its position upon an assertion of rights under that contract. Jupiter contended that the Commission was bound by the contract rate, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, which Jupiter alleged was lower than the 18.5-cent rate the Commission found. (Pet. App. 52a, 57a, J.A. 399; Tr. 3884).[5] The Commission

[5] In its application for rehearing of the Commission's December 13, 1968 order (which was not reprinted below), Jupiter claimed (Tr. 3884–3885): "* * * the contracts between Jupiter and Phillips-Kerr provide that the price to be paid to Phillips-Kerr shall be the price which Jupiter receives for the subject gas from Tennessee, less a contractual 'spread', which 'spread' is normally in the area of 2.4 to 2.5 cents per Mcf. Since, under ruling principles of law, including those enunciated in *United Gas Pipeline Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), a gas company cannot collect more than is allowed under its contracts, irrespective of whether the Commission

ruled against Jupiter's claim in finding (Pet. App. 8a, 13a, 15a–16a, 21a–22a, 36a) that, as Jupiter had conceded in the settlement papers, Phillips-Kerr-McGee's filed rate was that reflected by its contract on file with the Commission—18.5 cents per Mcf. While the court's discussion of Jupiter's contract claim was more detailed than the Commission's, this certainly provides no basis for complaint. Indeed, as this Court made clear in *Texas Gas Transmission Co.* v. *Shell Oil Co.*, 363 U.S. 263, 268, contract interpretations made by the Commission in determining the filed rate are subject to *de novo* interpretation by the reviewing court where, as here, no questions of agency expertise are involved.[6]

2. The court of appeals was also plainly correct (Pet. App. 58a–60a) in holding valid the Commission's enforcement order of December 13, 1968. After the Commission had determined that Jupiter was required to pay Phillips-Kerr-McGee 18.5 cents per Mcf, Jupiter nevertheless continued to withhold 1.4 cents per Mcf in its payments to the producers. It sought no judicial stay of the Commission's order, however, and the Commission properly took temporary measures necessary to assure compliance and protect the integrity of its earlier orders. It did so by

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authorizes any higher rate, Jupiter has consistently submitted that Phillips-Kerr cannot collect more than 17 to 17.1 cents per Mcf."

[6] Petitioner asserts (Pet. 10, note) but does not make any attempt to show, that the interpretation of the contract as supporting the 18.5-cent rate is incorrect. The discussion of the court below (Pet. App. 52a–54a) provides an adequate answer.

directing Tennessee, to whom the producers' gas was resold, prospectively to pay 18.5 cents per Mcf directly to the producers on Jupiter's account, while paying one cent to Jupiter directly.

Whether or not the Commission lacked authority to determine what would be just compensation for Jupiter's condensate services, it was entitled to protect its rate determinations from Jupiter's "self-help" efforts, pending decision of the compensation issue in the state courts. Whatever might be the case under other facts, it is clear enough that a charge of 1.4 cents per Mcf for minor operations concerning not more than five percent of the gas stream is one unlikely to have been reached by the parties in arms-length bargaining. (Compare p. 6 *supra*.) The December 13 order did not modify the rates established by the earlier orders, but rather took measures that evidently had become necessary to assure that they would be honored. Commission orders are not automatically stayed pending review, and may be implemented unless the appealing party secures a judicial stay[7]—which Jupiter failed to do. Section 19(c) of the Act, 15 U.S.C. 717r(c); *Dyer* v. *Securities and Exchange Commission*, 289 F. 2d 242 (C.A. 8). Since the natural gas companies were entitled to receive the contract rate on file with the Commission for the gas sold by them (under the so-called "filed rate" doctrine), the Commission did what was necessary to assure that they would once it appeared that Jupiter would not honor its obligations.

[7] Thus, the cases under the differing scheme of the National Labor Relations Act upon which petitioner relies in claiming a denial of due process (Pet. 13) are inapplicable.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1970.

APPENDIX

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, provides in pertinent part:

> SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.
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> SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order is-

sued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole, or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and

thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitue or will constitute a violation of the provisions of this act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.